SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-412

PHILLIPS PETROLEUM COMPANY, *Petitioner*,

v.

J. H. ADAMS, *et al.*, RIVERVIEW GAS CORPORATION COMPANY, *et al.*, and FIRST NATIONAL BANK OF BOSTON, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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J. H. ADAMS, *et al.*, RIVERVIEW GAS COMPRESSION COMPANY, *et al.*, and FIRST NATIONAL BANK OF BORGER, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Phillips Petroleum Company prays that a writ of certiorari issue to review three opinions and judgments of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on May 22, 1975.

OPINIONS BELOW

I. *Phillips Petroleum Company* v. *J. H. Adams, et al.*, No. 74-1777. Judgment of the District Court was accompanied by an unpublished memorandum opinion dated February 7, 1974, which appears in the Appendix hereto. (App. 28a). The opinion of the Court of Appeals for the Fifth Circuit is reported at 513 F.2d 355. (App. 45a).

II. *Phillips Petroleum Company* v. *Riverview Gas Compression Company, et al.*, No. 74-2009. The opinion of the District Court is reported at 372 F. Supp. 282. (App. 106a). The opinion of the Court of Appeals for the Fifth Circuit is reported at 513 F.2d at 513 F.2d 374. (App. 130a).

III. *First National Bank of Borger* v. *Phillips Petroleum Company*, No. 74-2330. The judgment of the District Court was accompanied by an unpublished memorandum opinion dated February 27, 1974, which appears in the Appendix hereto. (App. 86a). The opinion of the Court of Appeals for the Fifth Circuit is reported at 513 F.2d 371. (App. 97a).

JURISDICTION

The three judgments of the Court of Appeals for the Fifth Circuit were made and entered on May 22, 1975. Three separate timely petitions for rehearing *en banc* were denied on June 18, 1975 (App. 85a, 105a, 136a), and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals for the Fifth Circuit in a diversity action may award interest to natural gas producers pursuant to percentage of proceeds contracts on monies collected by the Petitioner during the pendency of rate increase proceedings before the Federal Power Commission when such sums were not due and payable to the gas producers until the rate increase was approved and when Texas statutes and state court decisions prohibit an award of interest for the period prior to the time money is due and payable.

STATUTES AND REGULATIONS INVOLVED

The statutory and regulatory provisions involved are set forth in the Appendix beginning at page 1a. They include the following:

1. Texas Revised Civil Statutes Annotated, arts. 5069-1.01 and 5069-1.03.
2. Rules of Decision Act, 28 U.S.C. § 1652.
3. Natural Gas Act, 15 U.S.C. §§ 717-717w.
4. 18 C.F.R. § 154.102.

STATEMENT OF THE CASE

Phillips Petroleum Company ("Phillips") is a major petrochemical company which is engaged, among other things, in the purchase, transportation, and sale of natural and casinghead gas. During the time relevant to this action, Respondents were all engaged in the production and sale of oil and gas from mineral leases in the Texas Panhandle. Casinghead gas produced by Respondents was sold to Phillips pursuant to precentage-of-proceeds contracts which provided that the amount payable under the contract would be pegged as a percentage of the price at which Phillips sold gas to third parties.

The price of gas charged by Phillips in its sales to pipeline companies for interstate transportation and resale was controlled by the Federal Power Commission ("FPC" or "Commission") under its broad authority to fix just and reasonable rates for such sales. The Natural Gas Act allows a company such as Phillips to increase its rates without prior FPC approval, but the Commission may impose a five-month suspension period and require the refund to purchasers of all or

part of the increase if it ultimately finds the higher rate was unjustified. 15 U.S.C. § 717c(e); 18 C.F.R. § 154.102. By statute the FPC may order payment of interest on the monies refunded to the pipeline companies. 15 U.S.C. § 717c(e); 18 C.F.R. § 154.102(e).

Phillips filed numerous proposed price increases with the FPC that were originally suspended by the Commission and later put into effect by Phillips subject to refund. Phillips was required to file a corporate undertaking with the FPC to make certain that such refunds would be made to purchasers if the FPC so ordered. Phillips made monthly payments to Respondents for its gas purchases on the basis of the "firm proceeds" of Phillips' own sales (i.e., calculated on the rates which FPC had previously approved) and did not remit any of the monies attributable to the proposed rate increases while FPC approval of the rates was still pending. This practice assured the availability of sufficient funds to pay any refunds to purchasers ordered by the FPC. If the higher rates were not approved by the FPC, Phillips would have an obligation to refund all or part of the funds to purchasers, and neither Phillips nor Respondents would have any legal claim to the money. If, on the other hand, there were an FPC approval of the increases, Phillips would become legally obligated to account for a portion of the excess funds to Respondents. Prior to final FPC action, Phillips was thus in the nature of a stakeholder among interested parties.

The FPC consolidated for hearing Phillips' pending rate increase applications and those of other companies under the consolidated designation Docket No. AR 64-1, *et al.*, known as the Hugoton-Anadarko Rate Cases.

On September 18, 1970, the FPC issued Opinion 586 which approved a portion of the price increases requested by Phillips and established refund requirements for those increases that were not approved. 44 F.P.C. 761 (1970). The State of California challenged the legality of the FPC Opinion, but on July 31, 1972, the Ninth Circuit Court of Appeals affirmed the FPC's decision. *People of the State of California, et al.* v. *Federal Power Commission,* 466 F.2d 974 (9th Cir. 1972). No petition for writ of certiorari was filed by any party during the 90-day period following the court's decision and on October 28, 1972, FPC Opinion 586 became final.

After the FPC Opinion become final, Phillips divided the excess funds it was holding subject to refund into two categories: (i) "refundable monies" which were based on rate increases disallowed by the FPC and which Phillips was obligated to return to purchasers with interest, and (ii) "sustainable monies" which Phillips was entitled to retain except that there now existed under the percentage-of-proceeds contracts an obligation by Phillips to account for a portion of the sustainable monies to the Respondents. Phillips therefore recomputed the weighted average price on each month's gas sales in the Texas Panhandle field to determine the difference between the firm proceeds which had been disbursed on a month-by-month basis and the amount to which the supplier of natural gas was now entitled as a result of the price increases just approved.

During the period the gas had been produced and sold to Phillips, the mineral leases were held by persons who, before FPC Opinion 586 was issued, as-

signed their leasehold interests to other parties. When FPC Opinion 586 became final, and Phillips' obligation to account for the additional funds matured, both the former owners and the present holders of the leases asserted conflicting claims to the funds which Phillips was prepared to pay. Phillips brought a diversity interpleader action in District Court to ascertain which claimant was entitled to receive the additional proceeds. Each of the Respondents not only asserted claims to the additional funds but also filed counterclaims against Phillips seeking interest on the money that had been held by the Company prior to the time the FPC action approving the rate increases became final.

Upon trial of these cases the District Court determined the ownership of the principal sum, but rejected the claims for interest. In disallowing the interest claims, the District Court stated that the claimants had no enforceable right to receive any of the money collected by Phillips subject to refund until the FPC approved the rate increases. Inasmuch as the money did not become due and payable until October 28, 1972, when the time for final challenge to FPC Opinion 586 had expired, the District Court held that the Company was not liable under Texas law for interest prior to that time. Further, from October 28, 1972, until December 21, 1973, when Phillips paid the money into the registry of the Court, there existed a bona fide dispute among the claimants to the money and Phillips was therefore not liable for interest during that time. The District Court noted that none of claimants had demanded that the money be paid into the registry of the Court following the final effective date of the FPC Opinion.

The District Court's ruling on the matter of interest was appealed to the United States Court of Appeals for the Fifth Circuit which reversed the District Court on this issue. The Court of Appeals held that notwithstanding the fact that the principal sum did not become due and payable until the FPC's Order became final, Phillips should nevertheless pay interest for the money collected prior to that time on equitable grounds.

REASONS FOR GRANTING THE WRIT

The Texas statutes and controlling judicial precedents of the State permit interest to be awarded only *after* the date that the principal sum of money owed becomes *due and payable*. These legal requirements, under the Rules of Decision Act, 28 U.S.C. § 1652 and the law of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), control the disposition of the instant diversity cases. The District Court faithfully followed this State law and denied Respondents the right to insist on interest during the period the FPC was deciding whether, and to what extent, the increase in rates would be approved. The Fifth Circuit Court of Appeals, in overruling the District Court, did not follow the interpretative criteria used by the Texas courts in determining when interest is to be paid; instead the Fifth Circuit superimposed on the clear statutory directive its own "equity" test. The decisions of the Court of Appeals are in direct conflict with the Texas statutory law and decisions of the Texas state courts. In addition, these decisions are in conflict with a prior decision of the Fifth Circuit which interpreted the Texas interest statute, but which was not cited in the Court of Appeals' opinions.

While these cases themselves involve large amounts of money, their outcome has an importance far greater

than the financial self-interests of the particular litigants. Failure to follow the state courts' interpretation of Texas law will subject Phillips and numerous other companies in the industry to thousands of claims aggregating many millions of dollars. In the Panhandle field of Texas alone, Phillips had 966 outstanding percentage-of-proceeds gas purchasing contracts with more than $9.7 million in additional proceeds attributable to these contracts.[1] The same legal issue in controversy here has already been raised in numerous pending cases; and the large financial stakes at risk make certain that hundreds of additional cases will be filed.[2]

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[1] *Phillips Petroleum Company* v. *J. H. Adams*, 513 F.2d at 357.

[2] A demand against Phillips for interest has been made in the following cases pending in federal or state courts: *Phillips Petroleum Company* v. *Grady Hazelwood, et al.*, No. CA-2-1398, U.S.D.C., N.D. Tex., Amarillo Div.; *Bolton, et al.* v. *Phillips Petroleum Company* v. *Glass*, No. CA-2-1478, U.S.D.C., N.D. Tex., Amarillo Div.; *Van Norman Oil Company* v. *Phillips Petroleum Company* v. *Van Norman Oil Company and American Petrofina Company of Texas*, No. CA-2-1492, U.S.D.C., N.D. Tex., Amarillo Div.; *R. P. Fuller, et al.* v. *Phillips Petroleum Company*, No. CA-5-74-140, U.S.D.C., N.D. Tex., Lubbock Div.; *Dunn, et al.* v. *Phillips Petroleum Company* v. *Barker*, No. CA-2-75-46, U.S.D.C., N.D., Tex., Amarillo Div.; *Lubell Oil Co.* v. *Phillips Petroleum Company, et al.*, No. C73-86, in the District Court in and for Tulsa County, Oklahoma; *Mitchell, et al.* v. *Phillips Petroleum Company* v. *Service Drilling Co.*, No. 53830A, in the 47th District Court in and for Potter County, Texas; *Shutts, et al.* v. *Phillips Petroleum Company*, No. 5309, in the District Court of Kiowa County, Kansas (a class action). In addition, various other class actions have been filed against other companies in District Court in the State of Kansas in which the issue of interest is being litigated: *Gray, et al.* v. *Amoco Production Company*, No. 3125, in the District Court of Grant County, Kansas; *Helmley, et al.* v. *Cities Service Oil Company*, No. 10,998, in the District Court of Stafford County, Kansas; *Maddox, et al.* v. *Gulf Oil Corporation*,

A Supreme Court determination is needed to put this legal question to rest and avoid a multiplicity of burdensome, expensive and needless lawsuits. Since the issue in dispute has widespread and continuing importance, not only to an essential segment of American industry, but also to the orderly administration of justice, these cases merit the attention of the Supreme Court.

I. The Decisions of the Fifth Circuit Are in Conflict with the Applicable Texas Statutes and State Court Decisions.

A. Texas Statutory and Case Law Do Not Allow an Award of Interest for the Period Prior to the Time the Interpleaded Funds in These Three Cases Became Legally Due and Payable.

Under Texas state court decisions, it was not legally proper for the Court of Appeals to disregard the explicit statutory criteria and hold, on broad equity grounds, that Phillips was legally obligated to pay interest on the money for the entire period the legal status of the proposed rate increases was being adjudi-

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No. 11,230 in the District Court of Seward County, Kansas; *Nix, et al.* v. *Northern Natural Gas Producing Company, et al.*, No. 3116, in the District Court of Grant County, Kansas; *Sterling, et al.* v. *Marathon Oil Company*, No. 10,764, in the District Court of Rice County, Kansas; *Sterling, et al.* v. *Superior Oil Company*, No. 2715, in the District Court of Stanton County, Kansas; *Coffey* v. *Atlantic Richfield Co.*, No. 3115, in the District Court of Grant County, Kansas; *Helmley* v. *Ashland Oil Company*, No. 125,388, in the District Court of Shawnee County, Kansas.

The instant three cases relate to FPC Opinion 586 governing rates in the Hugoton-Anadarko area. FPC Opinion 662 also has been issued regarding rates in the Permian Basin area of Texas and it is estimated that $7,500,000 in additional proceeds is attributable to natural gas transactions by Phillips in that area. Further, Phillips presently is collecting money subject to refund under the provisions of FPC Opinion 699, as amended (Docket R-389-B, Nationwide New Gas Rate) and collects approximately $500,000 per month at current rates.

cated by the FPC. Admittedly, no amount was due and payable to anyone until after the FPC Opinion became final and under the Texas statute this was the controlling factor.

Interest is defined under the Texas statute as "the compensation allowed by law for the use or forebearance or detention of money . . . ." Tex. Rev. Civ. Stat. Ann. art. 5069-1.01. The Texas statute further provides that:

> "When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable. . . ." (Tex. Rev. Civ. Stat. Ann. art. 5069-1.03.)

The parties have stipulated and admitted that the interpleaded funds did not become legally available for distribution until October 28, 1972, the date on which FPC Opinion 586 approving certain rate increases and disapproving others became immune from further legal attack. From that date until December 21, 1973, when Phillips paid the disputed funds into court, the Company was a stakeholder faced with the conflicting claims to the monies being held.

The Court of Appeals acknowledged that no award of interest should be made "except in such cases as come within the terms of the enabling legislation. *Watkins* v. *Junker,* 1897, 90 Tex. 584, 40 S.W. 11; *Kirkpatrick* v. *Great American Ins. Co.,* Tex. Civ. App. 1927, 299 S.W. 943, no writ." 513 F.2d at 365. The Court of Appeals held in this regard that the claimants could seek interest from Phillips only as "compensation allowed by law for the use . . . of money," and that

the principal sum owed here was "neither ascertainable nor due and payable until after the FPC Order became final. . . ."[3] 513 F.2d at 365.

The Texas courts have consistently held that interest not be awarded for the period prior to when the debt became due and payable. As far back as 1932 in *Watson Co.* v. *Shaw,* 47 S.W. 2d 474 (Tex. Civ. App., Dallas, 1932), *rev'd on other grounds, sub nom. American Surety Co.* v. *Shaw,* 69 S.W. 2d 47 (Tex. Comm. App. 1934) the Texas Court of Civil Appeals explained the rule by means of a short question:

> "But when did the principal sums become due and payable? For it is from this date that interest should be calculated." (47 S.W. 2d at 481.)

In *G&W Marine, Inc.* v. *Morris,* 471 S.W. 2d 644 (Tex. Civ. App., Beaumont, 1971, writ ref'd n.r.e.), an employee had brought an action against a corporate employer to recover amounts claimed to be due under an employment contract. The court awarded the employee additional compensation but held that under Tex. Rev. Civ. Stat. Ann. art. 5069-1.03, the statute involved here, interest could only be awarded *"from the date the sum became due and payable. . . ."* 471 S.W. 2d at 649 (Emphasis added).

In a somewhat analogous situation to the instant cases, the Attorney General of the State of Texas issued an opinion regarding the potential liability of pipeline companies for interest under the Texas inter-

[3] The Court of Appeals also noted that "Phillips has done the Adams family no wrong, so that the Adamses cannot claim interest as an item of damages, nor does this case fall within the statutory rubric of 'forebearance or detention' of money." 513 F.2d at 365.

est statute for nonpayment of royalties to the State. The Attorney General indicated that no interest can legally be awarded when the principal sum to be ascertained depends on action of a third party which has not occurred. Interest only accrues in that case after the amount has been ascertained and has become due and payable. Op. Att'y Gen. Tex. V-791 (1949).

The Fifth Circuit acknowledged that the Texas courts have been "strict in refusing interest for periods prior to the time when an obligation becomes due and payable" but concluded that interest could be awarded for a period prior to the due date of the debt for equitable reasons. 513 F.2d at 365-366. The only authority cited in support of this view is one case which did not even involve the Texas interest statute at issue here. *Treon* v. *Richter,* 265 S.W. 2d 125 (Tex. Civ. App., San Antonio, 1954, writ ref'd n.r.e.). *Treon* is an interest as damages case [4] and dealt with an interpretation of the provisions of the Agricultural Protective Act, Tex. Rev. Civ. Stat. Ann. art. 1287-1, *et seq.* The Court held only that under that statute where the buyer defaulted on a crop purchase payment, interest would start to accrue from the date the crop was delivered, even though a separate section of the statute permitted a 30-day payment delay. Tex. Rev. Civ. Stat. Ann. art. 1287-3, § 11. The Fifth Circuit stated that this decision

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[4] The four cases cited in *Treon* all dealt with interest awarded as damages. *Routon* v. *Phillips,* 246 S.W. 2d 223, 227 (Tex. Civ. App., Fort Worth, 1952, writ ref'd n.r.e.); *Settegast* v. *Timmins,* 6 S.W. 2d 425, 429-430 (Tex. Civ. App., Beaumont, 1928, writ ref'd n.r.e.); *Ewing* v. *Wm. L. Foley, Inc.,* 115 Tex 222, 280 S.W. 499, 503-504 (1926); and *Watkins* v. *Junker,* 90 Tex. 584, 40 S.W. 11, 12 (1897). Here, as the Court of Appeals itself noted, we are not concerned with interest as damages. 513 F.2d at 365.

was "apparently for equitable reasons." 513 F.2d at 366.

The controlling provision of the Texas interest statute states clearly that interest shall not be awarded until an obligation is "due and payable." Tex. Rev. Civ. Stat. Ann. art. 5069-1.03. The Court of Appeals cites no Texas state court decision where interest on the principal sum was awarded pursuant to this statute for a period prior to the time the obligation became due and payable.[5] The Court of Appeals does cite a number of cases where the Texas courts had to ascertain as a factual matter the amount actually owed on the date the legal obligation to pay matured. In those cases the sums due were found in fact also to be ascertainable and the decisions are therefore consistent with the literal requirements of the statute. By contrast the decisions in our cases cannot be reconciled with the statutory language because until the FPC decision became final, not only was the *amount* to be paid not ascertainable, but there was no legal obligation to pay anything at all—and there might never be such an

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[5] The Texas courts have explained that in construing State statutes, the ordinary meaning of words shall be used:

> "Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. *But they must find its intent in its language, and not elsewhere. They are not the law-making body.* They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain." *Texas Highway Commission* v. *El Paso Bldg. & Const. Trades Council*, 149 Tex. 457, 234 S.W. 2d 857 (1950) (Emphasis added).

obligation.[6] Thus, there was no due and payable date within the meaning of the statute.

B. Interest on the Interpleaded Funds Is Barred Under Texas Law for the Period Following the Effective Date of the FPC Order.

The Fifth Circuit held that interest to Respondents should be awarded not only for the period prior to when the FPC Order became final, but also from that date until December 21, 1973, when the Company tendered the interpleaded funds into the Registry of the District Court. The District Court refused to award interest for this period, holding that since there was "a bona fide dispute among the claimants to the money, Phillips Petroleum Company was not obligated in any respect for the payment of interest on said money up until December 21, 1973" when the money was deposited with the Clerk of the Court. In so ruling, the District Court correctly applied the law in Texas that a stakeholder who is uncertain to whom to pay a fund because of conflicting claims is not liable for interest for use of the funds during the period of uncertainty. For this ruling the District Court relied on *Allied Building Credits, Inc.* v. *Grogan Builders Supply Co.*, 365 S.W.2d 692 at 696 (Tex. Civ. App., Houston, 1963, writ ref'd n.r.e.), among other cases. *See also,* Op. Att'y Gen. Tex. V-791 (1949).

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[6] We note the well-established rule prohibiting an award of interest in bankruptcy cases. As stated by the Supreme Court in *Thomas* v. *Western Car Co.*, 149 U.S. 95, 116-117 (1893), and followed thereafter in a long line of cases:

> "after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, *interest is not allowed on the claims against the funds. The delay in distribution is the act of the law;* it is a necessary incident to the settlement of the estate." (Emphasis added)

The Fifth Circuit Court of Appeals ignored the applicable law of Texas as expressed by the courts of the State and instead based its ruling in this regard on its reading of cases in other jurisdictions. In so doing the Court stated:

> "We do not believe that the Texas law in this area is different from that in other jurisdictions, *but see Allied Building Credits, Inc.* v. *Grogan Builders Supply Co. . . .*" (513 F.2d at 369.)

While Phillips neither disputes nor concedes that the Court's interpretation of the law of other jurisdictions is correct, we submit that the only relevant law is that of the State of Texas and Texas law provides that a bona fide dispute over the title to funds bars any award of interest.

In *Allied Building Credits, Inc.* v. *Grogan Builders Supply Co.*, 365 S.W.2d 692 (Tex. Civ. App., Houston, 1963, writ ref'd n.r.e.), the Texas appellate court held that an award of interest for a time prior to the release of a federal tax lien was improper. The court thus stated:

> "Grogan was not entitled to any payment from the reserve account until that date. Prior to that date Grogan had become subject to a federal tax lien, so that Allied, which was served with such lien, could not make payment to Grogan with impunity until such tax lien was released. We are of the opinion that the trial court erred in allowing interest as was done, and that the amount of $4,532.00 should bear interest from October 18, 1960, when such lien was released. . . ." (365 S.W. 2d at 696.)

Similarly, in *Gulf Pipe Line Co.* v. *Nearen, et al.*, 138 S.W.2d 1065 (Tex. Comm. App. 1940), the Court held

that the purchase price of oil did not become due and payable until a dispute as to ownership was resolved and the amount due would not commence to draw interest until adverse claims to the funds were settled.

The Fifth Circuit's decision to overturn the District Court interpretation of State law on the issue of interest constituted an abrupt departure from settled principles of appellate review. In a diversity action the determination by a district court as to questions of the local law of the state where it sits is to be accorded great weight by the Court of Appeals, which will not adopt a contrary view unless clearly convinced of error. In this regard in another case involving the interpretation of Texas law, the Fifth Circuit stated:

> "It is not our function to expand the law of Texas. Rather, we must apply the interpretation which most likely would be applied by the Texas court of last resort. In this effort, due to his experience and familiarity with Texas law, precedent directs us to extend great deference to the Trial Judge's understanding of it. . . ." (*Devers* v. *Mobil Chemical Corp.*, 488 F.2d 258, 260 (5th Cir. 1973), *cert. denied*, 417 U.S. 947 (1974).)

The Court of Appeals in the instant cases has improperly refused to follow the clear mandate of Texas decisional law which, as the District Court determined, bars any award of interest.

II. The Decisions in the Instant Cases Are in Conflict with a Prior Decision of the Fifth Circuit.

The Fifth Circuit has not only refused to follow the applicable law of the State of Texas regarding the award of interest, but in addition, has ignored a prior decision in which the Court of Appeals had occasion

to construe the Texas interest statute. The facts of the earlier Fifth Circuit case, *City of Texarkana, Texas* v. *Arkansas Louisiana Gas Company*, 118 F.2d 289 (5th Cir. 1941), *vacated per stipulation*, 315 U.S. 780 (1942), bear a striking similarity to the facts presented here, although this contrary decision was not even cited in the Court of Appeals' opinions. In the *Texarkana* case the Appellee served as a public utility for the distribution of gas in both the City of Texarkana, Texas and the City of Texarkana, Arkansas. The Gas Company was required under the terms of its Texas franchise to charge no higher rates in Texas than it collected in Arkansas. The Gas Company had been compelled in litigation to establish lower rates in Arkansas and an action was brought to order the Gas Company to maintain in Texas these lower gas rates and to refund to Texas consumers any amounts that had been overcharged plus interest.

Upon trial of the case the District Court held that refunds to Texas consumers were due but that no interest would be allowed. The sole issue on appeal to the Fifth Circuit related to the disallowance of interest claims by the District Court. Since the case was a diversity action, the Fifth Circuit reviewed Texas law to determine whether interest should have been awarded the Texas consumers and held that interest was not required by statute, nor could it be awarded as damages for the detention of money. The Court thus stated:

> "The amount of each refund due in this case depended on simple fixed factors, to-wit, the rate charged and the rate finally established in Arkansas . . . . [T]he refund in this case was not due to be made as soon as the money was collected, for

> under the contract an involuntary lower rate was not to be put into effect in Texas until it was finally established in Arkansas. [citations omitted] Until then the Gas Company could collect and keep the money under the current Texas rate." (118 F.2d at 294-295.)

The Fifth Circuit explained that interest was not owing under the Texas interest statute since "the rates collected were collected under a bona fide claim of right . . . " and the refunds were not due and payable until the rates established in Arkansas became final. 118 F.2d at 291. Similarly, no interest can properly be awarded under Texas law in the instant cases until FPC Opinion 586 became final since Phillips had no duty to pay any sums to Respondents until that time. Indeed, the factual context here requiring the denial of interest is even more compelling than in the Texarkana case since no money was ever collected from claimants, held for a period, and subsequently refunded as in *Texarkana,* but rather the money was collected by Phillips from *third parties* and ultimately paid to Respondents when the amounts became due and payable.

The decisions of the Fifth Circuit in the instant cases are thus in direct conflict with the decision of the same Court of Appeals in the *Texarkana* case. Under Texas law the Fifth Circuit determined in *Texarkana* that interest could not be awarded for a period during which sums were collected from consumers under a bona fide claim of right, but would only accrue from the date that the sum were to be refunded, the due and payable date. In the instant cases the Fifth Circuit construed the virtually identical interest statute and held that interest should be paid prior to the due date for equitable reasons despite an explicit statutory pro-

hibition. Under these circumstances, this intracircuit conflict on a question of local law that is of great and recurring importance to the natural gas industry requires the exercise of the Supreme Court's power of supervision. *Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U.S. 456 (1967); *Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507, 508 (1950). As this Court stated in *John Hancock Ins. Co.* v. *Bartels,* 308 U.S. 180, 181 (1930):

> "Because of conflict in the rulings of the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court in the cases cited, and because of the importance of the question, we granted certiorari. . . ."

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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